

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: ADAMS GOLF, INC.
SECURITIES LITIGATION

)
) Civil Action No. 99-371-KAJ
) (CONSOLIDATED)
)

**APPENDIX TO UNDERWRITER DEFENDANTS' ANSWERING
BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE
AND EXCLUDE TESTIMONY OF EDWARD NECARSULMER III**

VOLUME III OF III

B393-B530

OF COUNSEL:

Michael J. Chopiga
Paul C. Gluckow
Theodore J. McEvoy
Ryan A. Kane
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017-3954
Tel. (212) 455-2831
Fax (212) 455-2502

Robert K. Payson (No. 274)
John E. James (No. 996)
POTTER ANDERSON & CORROON LLP
Hercules Plaza – Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000
E-Mail: rpayson@potteranderson.com
E-Mail: jjames@potteranderson.com

Attorneys for Underwriter Defendants

Dated: October 9, 2006
754546/23310

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

COPY

IN RE ADAMS GOLF, INC. : CONSOLIDATED
SECURITIES LITIGATION : C.A. No. 99-371 KAJ

Friday, August 11, 2006

Oral deposition of R. ALAN MILLER, taken
pursuant to notice, was held at the offices of AKIN,
GUMP, STRAUSS, HAUER AND FELD, LLP, 590 Madison
Avenue, 18th Floor, New York, New York 10022-2524
commencing at 8:50 a.m. on the above date, before Beth
A. Barkocy, Certified Shorthand Reporter and Notary
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1 A P P E A R A N C E S:

2 LAW OFFICES OF DONALD B. LEWIS
3 BY: DONALD B. LEWIS, ESQUIRE
4 Five Cynwyd Road
5 Bala Cynwyd, Pennsylvania 19004
6 (610) 668-0331
7 Morrislewislaw@aol.com
8 Representing the Plaintiffs

9 BERGER AND MONTAGUE, PC
10 BY: TODD S. COLLINS, ESQUIRE
11 1622 Locust Street
12 Philadelphia, Pennsylvania 19103-6365
13 (215) 875-3040
14 Tcollins@bm.net
15 Representing the Plaintiffs

16 SIMPSON, THACHER, AND BARTLETT, LLP
17 BY: PAUL C. GLUCKOW, ESQUIRE and
18 RYAN ANTHONY KANE, ESQUIRE
19 425 Lexington Avenue
20 New York, New York 10017
21 (212) 455-2831
22 Pgluckow@stblaw.com
23 Representing the Underwriter Defendants

24 AKIN, GUMP, STRAUSS, HAUER, AND FELD, LLP
25 BY: PAUL R. BESSETTE, ESQUIRE
26 300 West Sixth Street
27 Suite 2100
28 Austin, Texas 78701-3911
29 (512) 499-6200
30 Pbessette@akingump.com
31 Representing the Nonunderwriter Defendants

32 ALSO PRESENT:
33 Amir Rozen
34 Cornerstone Research

35

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15:39:55 1 MR. LEWIS: Object to the form.
15:39:57 2 THE WITNESS: And the rest of the
15:39:58 3 sentence in that paragraph.
15:40:00 4 BY MR. BESSETTE:
15:40:00 5 Q. And, obviously, its potentially
15:40:03 6 significant negative effect, which is why you claim
15:40:06 7 there should have been a risk factor disclosure in the
15:40:09 8 prospectus?
15:40:10 9 A. Yeah, that's essentially correct,
15:40:12 10 and subject to the last answer about what other
15:40:15 11 questions I may be asked; yeah, that's correct.
15:40:17 12 MR. BESSETTE: I'll pass the
15:40:19 13 witness.
15:40:19 14 Thank you.
15:40:20 15 THE WITNESS: You're welcome.
15:40:22 16 MR. GLUCKOW: I suggest we take five
15:40:24 17 minutes to get reorganized.
15:40:27 18 (Recess.)
15:44:00 19 BY MR. GLUCKOW:
15:44:30 20 Q. Mr. Miller, good afternoon.
15:44:32 21 A. Good afternoon.
15:44:32 22 Q. I'm Paul Gluckow, with Simpson,
15:44:38 23 Thacher, and Bartlett. We represent the underwriter
15:44:39 24 defendants in this matter, so my questions this
15:44:42 25 afternoon will focus on those aspects of your reports

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15:44:45 1 that have dealt with the underwriters' due diligence
15:44:50 2 issue.

15:44:51 3 A. Right.

15:44:51 4 Q. Based on the discussion today with
15:44:56 5 Mr. Bessette and other testimony that I've seen you've
15:45:02 6 given in the past, I think I can just do a little bit
15:45:05 7 more background in terms of your experience with due
15:45:09 8 diligence. My understanding is that in your career
15:45:16 9 you've conducted due diligence in connection with an
15:45:19 10 IPO on one occasion; is that correct?

15:45:30 11 MR. LEWIS: Objection to conducted.
15:45:34 12 Go ahead.

15:45:34 13 THE WITNESS: I don't believe so;
15:45:39 14 that is, there's one on which I recall
15:45:42 15 specifically being involved that was an
15:45:46 16 offering of common stock and warrants or
15:45:54 17 units; there was one involving -- pretty sure
15:46:04 18 it was a convertible preferred; there was
15:46:10 19 another that involved a debt security with
15:46:14 20 some kind of equity kicker. I did due
15:46:19 21 diligence on all those offerings.

15:46:24 22 Then there were a specific -- sorry,
15:46:33 23 there were offerings in which the firm I was
15:46:36 24 with was not a lead or co-lead underwriter or
15:46:41 25 in which we were not taking the lead role in.

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15:46:45 1 which I did do specific parts of due
15:46:48 2 diligence as opposed to a whole
15:46:50 3 responsibility for due diligence as part of
15:46:56 4 my work on probably three or four, five, six
15:47:01 5 occasions. There were -- or potentially a
15:47:12 6 few more than that, now that I'm thinking
15:47:15 7 about this.

15:47:16 8 There were then some matters on
15:47:18 9 which I was asked questions by our syndicate
15:47:21 10 department to look up very specific questions
15:47:24 11 that they had in a due diligence context in
15:47:29 12 an offering that we were being invited to
15:47:31 13 participate in, not as a lead manager, and
15:47:34 14 there were a couple of municipal leasing
15:47:37 15 deals that I worked very substantially on and
15:47:41 16 which we were involved in due diligence-type
15:47:44 17 work as well. Those were in connection with
15:47:48 18 public offering transactions.

15:47:53 19 BY MR. GLUCKOW:

15:47:54 20 Q. Initial public offerings? The
15:47:57 21 original question I asked you was due diligence in
15:47:59 22 connection with initial public offerings.

15:48:02 23 A. I'm sorry, with IPOs?

15:48:04 24 Q. Yes, that was my question. If you
15:48:06 25 want it read back --

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15:48:07 1 A. I'm sorry, I was hearing offerings,
15:48:10 2 not the initial part.
15:48:10 3 Q. Let's go back to the original
15:48:13 4 question, and again, my understanding is that you've
15:48:17 5 conducted due diligence in connection with initial
15:48:20 6 public offerings on only one occasion?
15:48:23 7 A. One that I can recall where we were
15:48:37 8 lead manager, co-lead manager, actually.
15:48:44 9 Q. That was the Caesar's matter?
15:48:53 10 A. Yes. Then we were the lead in the
15:48:55 11 municipal equipment leasing transaction, and I'm not
15:49:04 12 going to rule out the possibility there were one or
15:49:07 13 two IPOs in the list of deals on which I had worked in
15:49:11 14 some due diligence matter but did not have overall
15:49:16 15 responsibility. There was only one IPO that I can
15:49:18 16 recall in which we were co-lead in which I worked
15:49:21 17 actively on the whole due diligence assignment.
15:49:24 18 Q. That's Caesar's?
15:49:26 19 A. Correct.
15:49:27 20 Q. Who was your employer at that time?
15:49:29 21 A. It was actually Caesar's New Jersey,
15:49:32 22 Butcher and Singer.
15:49:34 23 Q. When did that deal close, roughly?
15:49:36 24 A. '78 or '79, I think.
15:49:45 25 Q. Is it true that you haven't been

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15:49:47 1 involved with due diligence in connection with an
15:49:50 2 initial public offering since the closing of the
15:49:53 3 Caesar's transaction?
15:49:54 4 MR. LEWIS: Objection to form.
15:49:57 5 THE WITNESS: As an underwriter --
15:50:02 6 I'm sorry, again, that was IPOs?
15:50:04 7 BY MR. GLUCKOW:
15:50:04 8 Q. Correct.
15:50:07 9 A. As an underwriter, certainly since
15:50:10 10 the time I worked at Butcher and Singer except for one
15:50:14 11 matter as a consultant that I can recall where I was
15:50:19 12 at PCA, which, I think, continued, actually, into PIBC
15:50:31 13 formation, and the other open question is whether at
15:50:36 14 Butcher between the Caesar's deal or at some other
15:50:39 15 time at Butcher whether there was an IPO in the list
15:50:43 16 of things on which I worked but was not primarily
15:50:47 17 responsible for.
15:50:48 18 Q. In terms of initial public offerings
15:50:52 19 where you were involved in due diligence where your
15:50:57 20 employer was either the lead underwriter or co-lead
15:51:01 21 underwriter, the only example of that that you can
15:51:04 22 think of as you sit here now is the Caesar's New
15:51:07 23 Jersey example; is that correct?
15:51:08 24 A. Correct, subject to the last couple
15:51:10 25 of questions and answers, right.

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15:51:14 1 Q. You mentioned PCA. PCA was not an
15:51:19 2 underwriter in that transaction you were referring to,
15:51:23 3 correct?

15:51:25 4 A. That's correct. I was acting as a
15:51:28 5 consultant to a party involved in an underwriting.

15:51:29 6 Q. You would not have been doing
15:51:31 7 underwriter due diligence in that transaction,
15:51:35 8 correct?

15:51:35 9 MR. LEWIS: Objection to the form.

15:51:37 10 THE WITNESS: Yeah, that's correct.

15:51:39 11 It was not from the perspective of the
15:51:41 12 underwriter.

15:51:44 13 BY MR. GLUCKOW:

15:51:44 14 Q. The other transactions that you
15:51:54 15 talked about in response to my very first question
15:51:57 16 when you were thinking I was talking about offerings
15:51:59 17 as opposed to initial public offerings, we can safely
15:52:03 18 assume that all those transactions that you referred
15:52:06 19 to were not initial public offerings where you had
15:52:10 20 some role doing due diligence on behalf of an employer
15:52:14 21 that was involved in the underwriting of the
15:52:17 22 transaction, correct?

15:52:48 23 A. I missed the first part.

15:52:48 24 MR. GLUCKOW: Would you read it
15:52:50 25 back, please.

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15:52:50 1 (The pending question was read
15:52:51 2 back.)
15:52:51 3 THE WITNESS: Yeah, except for the
15:52:53 4 one or two, perhaps, in which I did specific
15:52:55 5 due diligence assignments as part of a group
15:52:58 6 but not with a primary responsibility for the
15:53:00 7 whole due diligence function.
15:53:01 8 BY MR. GLUCKOW:
15:53:01 9 Q. Let's talk about those one or two.
15:53:04 10 Tell me what you recall about those.
15:53:06 11 A. Just that we as a consequence of
15:53:10 12 being involved in a group of firms that acted together
15:53:13 13 to do offerings upon occasion where someone else may
15:53:18 14 have the primary responsibility for due diligence,
15:53:20 15 they may have asked for assistance or staffing on
15:53:24 16 follow-up on certain items or investigation of certain
15:53:27 17 items, so I'd get a phone call or a memo or something
15:53:32 18 that would say would you please look into the
15:53:33 19 following and identify some area or tasks that we were
15:53:38 20 asked to perform, then I would do that and then report
15:53:41 21 back to whoever was asking me.
15:53:44 22 Q. That's when you were with Butcher?
15:53:50 23 A. Yes.
15:53:50 24 Q. What would have been the time frame
15:53:52 25 for those one or two that you have in mind?

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15:53:56 1 A. They would have been -- well,
15:54:08 2 actually, '76 through '79.
15:54:16 3 Q. Again, your employer -- just to be
15:54:20 4 clear on this, your employer, Butcher, was neither the
15:54:23 5 lead nor the co-lead on those transactions, correct,
15:54:27 6 the lead underwriter or the co-lead underwriter on
15:54:31 7 those two transactions we're talking about?
15:54:32 8 A. Not that I'm thinking of. If we
15:54:32 9 were one of the leads, we were not taking primary
15:54:35 10 responsibility for due diligence in that sense.
15:54:57 11 Q. Let me try and boil this down, then.
15:54:57 12 In your career, you've conducted due
15:55:00 13 diligence in connection with an initial public
15:55:03 14 offering where your employer was a lead or co-lead
15:55:05 15 underwriter on one occasion, and that was the Caesar's
15:55:08 16 New Jersey matter in the '78 to '79 time period,
15:55:08 17 correct?
15:55:20 18 A. Yeah; again, I think that's correct
15:55:22 19 with the possible exception of one or two others in
15:55:26 20 which we were not taking primary role for due
15:55:28 21 diligence but may have appeared as the lead
15:55:34 22 underwriter.
15:55:38 23 Q. Then it's also fair to say, I
15:55:43 24 believe, that you have not been involved in due
15:55:45 25 diligence in connection with an initial public

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15:55:50 1 offering where your employer was a lead or co-lead
15:55:53 2 underwriter since at least 1980, correct?
15:55:57 3 A. Sure; that's correct.
15:55:59 4 Q. Have you published any articles on
15:56:04 5 the topic of due diligence? I don't see any listed on
15:56:07 6 your CV but I just want to confirm.
15:56:26 7 A. I don't recall exactly. We
15:56:28 8 published quite a number of articles in the series of
15:56:32 9 newsletters that I referred to earlier back in
15:56:38 10 the '70s which involved a variety of financing
15:56:40 11 techniques, a lot of which involved going public. I
15:56:46 12 would be surprised if there wasn't some articles
15:56:51 13 during that time on due diligence. Some of that might
15:56:59 14 have been from the perspective of the officers and
15:57:02 15 directors as opposed to the underwriters because our
15:57:07 16 clients at that time tended to be prospective issuers
15:57:13 17 as opposed to underwriters. That was a topic that was
15:57:18 18 part of the research I had done on the 550 IPOs from
15:57:24 19 '68 to '72 that I referenced earlier, and that,
15:57:28 20 therefore, appeared in some of our publications around
15:57:32 21 that time.
15:57:33 22 Q. These newsletters you're talking
15:57:35 23 about would have been written in what time period, the
15:57:38 24 early '70s?
15:57:39 25 A. '72 through '76.

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15:57:41 1 Q. These were not -- were these
15:57:44 2 published to the world at large or were these client
15:57:48 3 newsletters sent to clients and prospective clients of
15:57:48 4 the firm?

15:57:53 5 A. They were sent to clients,
15:57:57 6 prospective clients, and paid subscribers who tended
15:58:00 7 to be prospective issuers and service providers to
15:58:04 8 prospective issuers.

15:58:05 9 Q. As you sit here today, can you
15:58:07 10 recall any newsletters that you worked on that
15:58:11 11 specifically dealt with the topic of underwriters' due
15:58:15 12 diligence?

15:58:19 13 A. No, I can't recall specifically, but
15:58:21 14 as I said, it was part of the study that I did at that
15:58:25 15 time and there was fairly intensive -- we wrote about
15:58:29 16 just about every aspect of that study over a period of
15:58:33 17 years. I'd be surprised if it was not covered in
15:58:38 18 something we did but, again, the focus at that time
15:58:43 19 from our point of view was more on the prospective
15:58:48 20 issuer than on the underwriter, although we did cover
15:58:51 21 all the participants in the process. Again, I can't
15:58:54 22 recall specifically, but I would be surprised if it
15:58:56 23 was not among those articles.

15:58:58 24 Q. Do you have copies of the articles?

15:59:00 25 A. No, I don't.

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15:59:00 1 Q. How would you go about finding these
15:59:04 2 articles or newsletters if you wanted to?

15:59:06 3 A. I haven't been able to. I would
15:59:07 4 have asked the company or its successors but they are
15:59:10 5 now gone except for the group that publishes what's
15:59:13 6 now called, I believe, the IPO Reporter or the IPO
15:59:24 7 Journal, and the owner of that publication apparently
15:59:27 8 doesn't or wouldn't have them, but the group that
15:59:29 9 generates the editorial content, I've checked with and
15:59:33 10 they don't appear to have any of it either. As far as
15:59:36 11 I know, that's the last continuing thread of people.

15:59:40 12 Q. The study that you referred to, was
15:59:42 13 that study reduced to writing and published?

15:59:48 14 A. Not as one block of information like
15:59:51 15 that. It was presented in numerous client memos,
15:59:54 16 seminars, constituted a lot of the material for a
16:00:02 17 draft of a book that we didn't publish and that sort
16:00:05 18 of thing, but I don't recall that we ever put the
16:00:09 19 entire study together in one place like that.

16:00:14 20 We did publish at the time a CPM
16:00:19 21 chart of the process with annotated sections that
16:00:22 22 actually would have represented a summary of that, but
16:00:25 23 I don't think we actually ever produced the entire
16:00:29 24 work.

16:00:29 25 Q. Do you have any versions of the

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16:00:31 1 study in your possession today?

16:00:33 2 A. No.

16:00:33 3 Q. Do you have any idea how to get that
16:00:37 4 document if it exists as a document?

16:00:40 5 A. No, I'd give you the same answer as
16:00:42 6 the newsletters, same timing, same people.

16:00:50 7 Q. Putting aside the newsletters, which
16:00:56 8 may or may not have had something specific on
16:00:59 9 underwriters' due diligence, can you think of any
16:01:02 10 other publications that you've authored on the topic
16:01:07 11 of underwriters' due diligence?

16:01:09 12 MR. LEWIS: Objection to form.

16:01:09 13 THE WITNESS: No.

16:01:20 14 BY MR. GLUCKOW:

16:01:21 15 Q. I just want to confirm: On the
16:01:23 16 newsletters and the study we have talked about, to the
16:01:28 17 extent that there may have been at one time something
16:01:31 18 dealing with underwriters' due diligence, would that
16:01:34 19 have been something that you would have been a
16:01:36 20 principal author of, and if not, what would have been
16:01:38 21 your role?

16:01:39 22 MR. LEWIS: Objection to form.

16:01:40 23 THE WITNESS: I was either author or
16:01:42 24 editor of all of the articles that appeared
16:01:46 25 at that time, and of those, I would have been

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16:01:48 1 the author because I did the study.
15:53:01 2 BY MR. GLUCKOW:
15:53:01 3 Q. Have you ever taught any courses
16:02:10 4 that addressed the topic of underwriters' due
16:02:14 5 diligence?
16:02:24 6 A. Not as a topic in itself, no. I
16:02:27 7 believe that may have been a brief portion of a talk
16:02:30 8 or couple of talks that I gave at the Wharton School
16:02:35 9 back in mid to late '70s or early '80s where some of
16:02:47 10 the topics included various types of financing
16:02:51 11 including going public and the roles of the
16:02:53 12 participants, some of the work that underwriters did
16:02:58 13 and that sort of thing.
16:03:02 14 Q. How many talks do you recall giving
16:03:06 15 at Wharton in the late '70s or early '80s that might
16:03:10 16 have addressed as a component underwriters' due
16:03:13 17 diligence?
16:03:14 18 A. There were at least three or four, I
16:03:21 19 believe, such talks.
16:03:22 20 Q. Any recollection as to what portion,
16:03:24 21 if any, of the talks would have addressed
16:03:26 22 underwriters' due diligence?
16:03:29 23 MR. LEWIS: Objection as to form.
16:03:31 24 THE WITNESS: In one sense, it was a
16:03:33 25 fairly small portion because the talks may

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16:03:37 1 have been 45 minutes to an hour and generally
16:03:40 2 covered the topics of the state of the public
16:03:45 3 markets for raising capital, the roles of
16:03:50 4 participants in the markets and those sort of
16:03:54 5 things, so as a part of the topic, I would
16:03:56 6 have thought, as part of the outline, it
16:03:58 7 would have been a fairly small portion;
16:04:01 8 however, the obsession of MBA students with
16:04:05 9 getting jobs in investment banking firms
16:04:05 10 tended to generate more questions in that
16:04:08 11 area than I would have expected and I did
16:04:09 12 spend more time on what underwriters do than
16:04:12 13 I probably otherwise would have.

15:53:01 14 BY MR. GLUCKOW:

15:53:01 15 Q. The audience for these talks were
16:04:18 16 MBA students; is that correct?

16:04:18 17 A. Yes.

16:04:25 18 Q. Can you think of any other courses
16:04:27 19 that you've taught or public lectures that you've
16:04:33 20 given of any kind on the topic of underwriter due
16:04:36 21 diligence?

16:04:38 22 A. I don't believe so.

16:04:44 23 Q. If you wouldn't mind turning to 334,
16:04:49 24 your initial report, Page 4, Paragraph 6, the last
16:04:56 25 sentence refers to PLI and similar programs and

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16:05:02 1 seminars on topics such as corporate finance and due
16:05:05 2 diligence?
16:05:06 3 A. Right.
16:05:06 4 Q. Can you recall any specific PLI or
16:05:10 5 similar programs or seminars that specifically address
16:05:14 6 underwriter due diligence that you've attended in the
16:05:18 7 last ten years?
16:05:22 8 A. No; in the last ten years, I don't
16:05:24 9 believe I've attended any seminars. We tend to get,
16:05:29 10 on an occasional basis, I guess I'd say, publications,
16:05:37 11 transcripts, and that sort of thing from those types
16:05:40 12 of seminars, and I get regular -- subscribe to a
16:05:47 13 service called due diligence and securities
16:05:50 14 transactions by Robert Haft. I don't recall the
16:05:55 15 publisher of that, but it's in a workbook-sized
16:05:58 16 publication, updated about every two years or so, or
16:06:06 17 at least I get the updates about that often. That
16:06:08 18 would be more the type thing we do in the last ten
16:06:12 19 years.
16:06:12 20 The PLI actual seminars I attended
16:06:16 21 would have been earlier; back in the '70s and
16:06:20 22 early '80s, I think, was when I did that kind of
16:06:21 23 thing.
16:06:21 24 Q. You don't remember going to any
16:06:24 25 program such as that since the early '80s?

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16:06:27 1 A. No, I don't recall attending them
16:06:29 2 since the early '80s. Since then, I primarily relied
16:06:33 3 on obtaining the transcripts or the workbooks from
16:06:35 4 them or subscribing to other such materials as I've
16:06:40 5 described here.

16:06:43 6 Q. In the due diligence that you have
16:06:53 7 been involved in in your own career that you've
16:06:57 8 described, have you ever dealt with gray market
16:07:00 9 issues?

16:07:03 10 A. Not that I can recall.

16:07:29 11 Q. On Page 3 of your report -- again,
16:07:33 12 we're on 334 -- you state in Paragraph 3 that you've
16:07:42 13 been qualified or accepted as an expert on, among
16:07:45 14 other things, investment banking practices; is that
16:07:45 15 correct?

16:07:49 16 A. Right.

16:07:49 17 Q. Have you ever been qualified or
16:07:51 18 accepted as an expert concerning your opinions related
16:07:54 19 to underwriter due diligence specifically?

16:08:20 20 A. Good question. The cases that come
16:08:25 21 to mind first are two in which investment banker due
16:08:33 22 diligence was at issue but not in connection with
16:08:36 23 public offerings necessarily. It would be in
16:08:42 24 connection with other functions investment bankers
16:08:45 25 were performing or purporting to perform.

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16:08:49 1 I'd have to go through the testimony
16:08:50 2 list here and see what other ones there may have been.
16:08:53 3 Those are the first two I can think of.
16:08:55 4 Q. Just so I'm clear, I thought you
16:08:57 5 were referring to one matter but were you actually
16:08:59 6 referring to two different matters where investment
16:09:02 7 banker due diligence was at issue but it was not in
16:09:07 8 connection with an offering?
16:09:08 9 A. Correct.
16:09:11 10 Q. If you wouldn't mind looking at your
16:09:14 11 list of matters, tell me if you can think of any
16:09:18 12 others and we can go through them. Thank you.
16:09:46 13 A. One of the first two I mentioned was
16:09:48 14 No. 14.
16:09:55 15 Q. Which list are you on?
16:09:57 16 A. I'm sorry, expert witness testimony
16:10:00 17 in court.
16:10:01 18 Q. This is McKinley Allsop, Inc.?
16:10:05 19 A. Right.
16:10:23 20 The second one I was thinking of was
16:10:25 21 No. 25.
16:10:29 22 Q. Kenny v. Bear Stearns?
16:10:32 23 A. Right.
16:10:42 24 Another one was 26, which was in
16:10:45 25 connection with an offering. I just don't recall if

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16:10:49 1 it was a public offering or a private placement at the
16:10:58 2 moment.
16:11:06 3 On the deposition and arbitration
16:11:09 4 testimony list, No. 1.
16:11:16 5 Q. Shearson?
16:11:24 6 A. Yes.
16:11:30 7 No. 8.
16:11:34 8 Q. American Dental Laser?
16:11:40 9 A. Right.
16:11:42 10 No. 12, No. 13, No. 15. I think
16:12:14 11 No. 18, as best I recall. I think No. 21, as best I
16:12:20 12 recall. No. 26, No. 50, No. 56. That's it.
16:13:51 13 Q. The ones you just gave me most
16:13:55 14 recently off of the deposition and arbitration
16:13:57 15 testimony list starting with the Shearson matter and
16:14:00 16 going down to the CFS matter, which is 56, Shearson
16:14:04 17 was one, those are all matters, I take it, where you
16:14:08 18 either provided a report or were deposed or both but
16:14:14 19 not, which is where we started, where you'd been
16:14:17 20 qualified or accepted as an expert concerning your
16:14:21 21 opinions related to due diligence; is that correct?
16:14:26 22 A. (No response.)
16:14:27 23 Q. Because it didn't get to trial, in
16:14:30 24 other words?
16:14:30 25 A. Correct.

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16:14:32 1 Q. Going back to where we started in
16:14:34 2 terms of matters where you've been qualified or
16:14:36 3 accepted as an expert concerning your opinions related
16:14:40 4 to due diligence by underwriters, it would just be the
16:14:43 5 first three we started with, No. 14, No. 25, and
16:14:48 6 No. 26 off the expert witness testimony in court list,
16:14:48 7 correct?
16:14:53 8 A. Right; that's correct.
16:14:57 9 Q. No. 14, McKinley Allsop, that was
16:15:02 10 one of the matters you mentioned that involved
16:15:05 11 investment banker due diligence but did not involve
16:15:08 12 any kind of an offering; is that right?
16:15:11 13 A. Right.
16:15:11 14 Q. What was the issue in that case?
16:15:14 15 A. Whether McKinley Allsop had
16:15:19 16 adequately done its work in connection with the
16:15:22 17 issuance of a highly confident letter regarding
16:15:27 18 financing for Jetborne.
16:15:34 19 Q. No. 25, Kenny, was another one you
16:15:44 20 said where there was no offering involved but the
16:15:45 21 matter otherwise raised issues of due diligence; is
16:15:45 22 that correct?
16:15:50 23 A. Correct.
16:15:50 24 Q. What was the issue there?
16:15:52 25 A. Whether Bear Stearns performed

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16:15:54 1 properly in its role as financial advisor to Daisy
16:16:01 2 Systems including in connection with issuing a highly
16:16:05 3 confident letter and financing commitment and
16:16:08 4 providing advice about financing to Daisy Systems.
16:16:13 5 Q. No. 26, Alpha Group, you thought may
16:16:17 6 have involved a private placement but you weren't a
16:16:20 7 hundred percent sure?
16:16:21 8 A. Yeah, it was either a public
16:16:23 9 offering or private placement of bonds. The more I
16:16:27 10 think about that, it might have been a private
16:16:30 11 placement but the issue was similar.
16:16:32 12 Q. What was the issue, as you recall
16:16:34 13 it?
16:16:34 14 A. As to whether or not Bear Stearns
16:16:36 15 had performed adequate due diligence and insured
16:16:40 16 proper disclosure in a prospectus or offering
16:16:44 17 materials in connection with the sale of bonds.
16:16:47 18 Q. Do you have any materials related to
16:16:50 19 that matter?
16:16:52 20 A. I don't know.
16:17:02 21 Q. How would you find out?
16:17:05 22 A. I would look in the office.
16:17:06 23 Q. If you did, they would be maintained
16:17:08 24 at PIBC?
16:17:15 25 A. Right.

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16:17:16 1 Q. Now that you've thought about it
16:17:19 2 some more, you think that the matter involved the
16:17:23 3 private placement as opposed to a public offering?
16:17:26 4 A. I think so. One of the reasons I'm
16:17:33 5 hesitating about that is that there were individual
16:17:35 6 purchasers involved as opposed to institutions, as
16:17:38 7 opposed to solely institutions, and it does raise that
16:17:41 8 question, but as best I can recall, it was a private
16:17:44 9 placement.
16:17:58 10 Q. As I understand it, you've never
16:18:02 11 offered testimony on behalf of a defendant in a matter
16:18:05 12 involving the issue of whether investment bankers did
16:18:11 13 due diligence properly; is that correct?
16:18:13 14 MR. LEWIS: Objection as to form.
16:18:18 15 THE WITNESS: I think that's
16:18:19 16 correct.
16:18:19 17 BY MR. GLUCKOW:
16:18:20 18 Q. As I understand it, you've never
16:18:22 19 written an expert report on behalf of a defendant in a
16:18:26 20 case involving the issue of whether the investment
16:18:30 21 bankers did due diligence properly; is that also
16:18:34 22 correct?
16:18:34 23 MR. LEWIS: Objection as to form.
16:18:50 24 THE WITNESS: That, I don't recall.
16:18:51 25 I don't recall testifying about that before.

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16:18:54 1 I don't recall if I may have written such a
16:18:56 2 report or not.
15:53:01 3 BY MR. GLUCKOW:
15:53:01 4 Q. Can you recall writing an expert
16:19:04 5 opinion that underwriters performed adequate due
16:19:09 6 diligence?
16:19:32 7 A. I can't recall whether I have or
16:19:33 8 not.
16:19:38 9 Q. As you sit here, you can't recall --
16:19:41 10 I'm sure you can recall reports you've written or
16:19:44 11 opinions you've offered that underwriters have not
16:19:48 12 performed adequate due diligence, correct?
16:19:50 13 MR. LEWIS: Objection to form.
16:19:54 14 THE WITNESS: At least the ones that
16:19:57 15 relate to matters printed on these lists, I
16:20:01 16 can jog my memory through the lists. Sitting
16:20:06 17 here, I can't recall others at the moment of
16:20:10 18 that type.
15:53:01 19 BY MR. GLUCKOW:
15:53:01 20 Q. The ones we talked about earlier off
16:20:17 21 of the trial testimony list, No. 14, 25, and 26, and
16:20:21 22 off of the deposition and arbitration list, one,
16:20:24 23 eight, 12, 13, 15, 18, 21, 26, 50, 56, I take it from
16:20:31 24 your answers that in each of those cases you were
16:20:36 25 offering an expert opinion stating that the

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16:20:41 1 underwriters did not perform adequate due diligence,
16:20:45 2 correct?
16:20:45 3 MR. LEWIS: Objection to form.
16:20:50 4 THE WITNESS: I think that's
16:20:52 5 correct. That would have been a part of the
16:20:54 6 opinions I was providing in those cases, yes.
15:53:01 7 BY MR. GLUCKOW:
15:53:01 8 Q. Again, if we could look at
16:21:21 9 Exhibit-334, your initial report, Pages 11 to 13 have
16:21:27 10 a section entitled underwriter due diligence; do you
16:21:31 11 see that? It's Paragraphs 19 through 22.
16:21:39 12 A. Right.
16:21:39 13 Q. I don't know if you can do it this
16:21:43 14 way, but if you can, how many hours, as best you can
16:21:46 15 estimate, did you spend drafting this section of the
16:21:49 16 report, Paragraphs 19 through 22 addressed to the
16:21:56 17 underwriters' due diligence?
16:21:59 18 MR. LEWIS: Objection to the form.
16:22:46 19 THE WITNESS: On a relative basis,
16:22:48 20 not many. As you can see, the bulk of this
16:22:54 21 section is what I would call more general
16:22:59 22 sort of information as to the type of
16:23:01 23 information that's required to be reviewed,
16:23:04 24 the type of work that has to be done, the
16:23:07 25 underwriters' attitude and those sorts of

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16:23:11 1 things, what the standard of information is.
16:23:19 2 I note that I will await receiving expert
16:23:23 3 reports because the burden on the
16:23:26 4 establishment of the adequacy of the due
16:23:30 5 diligence investigation is on the defendants
16:23:32 6 and that the -- then I gave an opinion as to
16:23:37 7 the disclosure and the prospectus in the gray
16:23:41 8 market area. Except for the last paragraph,
16:23:44 9 the rest of this didn't take very long to
16:23:48 10 write and is more general in nature.
16:23:52 11 Having said that, if I went back
16:23:56 12 over some period of time and tried to develop
16:24:00 13 what led to my being able to write this
16:24:03 14 fairly quickly, it obviously involves a lot
16:24:05 15 more work over a long number of years in
16:24:08 16 terms of experience, background, education,
16:24:13 17 attendance at the seminars, subscription to
16:24:18 18 the materials we talked about and all that
16:24:20 19 sort of thing, but actually reducing all that
16:24:22 20 to writing, obviously, as a function in this
16:24:24 21 case, didn't take all that long.
16:24:25 22 The last paragraph is a little more
16:24:27 23 complex because it involved reviewing the
16:24:30 24 information that I have described earlier and
16:24:33 25 essentially all the information in the case

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16:24:35 1 up to that point as part of coming to the
16:24:38 2 conclusion that the disclosure and the
16:24:41 3 prospectus was inadequate in the sense I
16:24:45 4 identify here, so that would have been longer
16:24:47 5 but I didn't attempt to allocate any number
16:24:50 6 of hours to this in the way you asked.
16:24:53 7 BY MR. GLUCKOW:
16:24:53 8 Q. Let's put aside Paragraph 22 for the
16:24:56 9 moment and just focus on Paragraphs 19 through 21.
16:25:00 10 Can you give your best estimate as to how long it took
16:25:03 11 you to draft those paragraphs, 19, 20, 21, setting
16:25:08 12 down, as you said, the general standards. Again, I
16:25:11 13 mean for this report. I understand there were other
16:25:13 14 things in the past years that led up to your ability
16:25:16 15 to put these words on paper, but in terms of the time
16:25:19 16 you spent writing Paragraphs 19, 20, 21 for this
16:25:24 17 report, was it less than an hour, was it between one
16:25:28 18 and ten hours; can you give me an estimate?
16:25:31 19 MR. LEWIS: Objection to form, asked
16:25:33 20 and answered.
16:25:33 21 THE WITNESS: I'll take the one and
16:26:09 22 ten as opposed to the less than one of your
16:26:12 23 current choices.
15:53:01 24 BY MR. GLUCKOW:
15:53:01 25 Q. Don't feel constrained by my

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16:26:18 1 choices. If you think it was some other number, one
16:26:21 2 to five, more than ten, tell me what your best
16:26:24 3 recollection is.

16:26:24 4 MR. LEWIS: Objection to the form.

16:26:26 5 THE WITNESS: I'm sure it's in the
16:26:27 6 one to ten range. Better than that, I just
16:26:30 7 don't recall. Again, that's without
16:26:31 8 reference to all the historical or
16:26:35 9 preparatory work that you might describe as
16:26:37 10 going into this, the purpose being,
16:26:39 11 obviously, to explain some framework around
16:26:42 12 which meant look at this issue, the types of
16:26:45 13 information that would be important which I
16:26:48 14 might be asked about to explain at trial, and
16:26:51 15 otherwise the focus was on seeing what the
16:26:54 16 defendants established in terms of the
16:26:57 17 adequacy of their due diligence.

15:53:01 18 BY MR. GLUCKOW:

15:53:01 19 Q. Putting aside the drafting of the
16:27:03 20 paragraphs, if you can recall, how much time did you
16:27:06 21 spend considering the adequacy of the underwriters'
16:27:11 22 due diligence up through the time that you submitted
16:27:14 23 your initial report, recognizing that you were holding
16:27:18 24 back your ultimate opinion until you saw what the
16:27:22 25 defendants were going to say; to what extent, if at

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16:27:25 1 all, did you spend time considering the adequacy of
16:27:28 2 the underwriters' investigation?
16:27:30 3 MR. LEWIS: Objection to the form,
16:27:32 4 compound.
16:27:33 5 THE WITNESS: I'm trying to recall
16:28:04 6 in terms of time frame when I was doing what
16:28:07 7 portions of work in that sense. I'm looking
16:28:26 8 at this in two parts, I suppose. One is the
16:28:30 9 conclusion that the due diligence and result
16:28:32 10 of the due diligence was inadequate is a very
16:28:36 11 quick decision to come to if you presume that
16:28:39 12 counsel will establish the facts alleged in
16:28:42 13 the complaint, in that if there's a material
16:28:44 14 issue not disclosed in the complaint, then
16:28:47 15 the underwriters, by definition, have not
16:28:50 16 performed their due diligence
16:28:53 17 responsibilities unless one takes the
16:28:55 18 somewhat perverse view that you can, in my
16:28:58 19 opinion, I should say -- that you could
16:29:00 20 conduct a reasonable due diligence
16:29:03 21 investigation but not print the results of
16:29:05 22 such an investigation and somehow feel as
16:29:07 23 though you met your burden. That is as long
16:29:11 24 as the prospectus does not disclose a
16:29:14 25 material risk or issue, then all of the

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16:29:21 1 signatories to the registration statement, as
16:29:25 2 well as the participants in the drafting and
16:29:28 3 preparation of the prospectus as outlined in
16:29:31 4 Section 11, as I understand it, are
16:29:32 5 responsible for the contents of the
16:29:35 6 prospectus, so you can get to that point
16:29:38 7 fairly quickly if you assume the
16:29:42 8 establishment of those facts.

16:29:45 9 To then go beyond that and reach the
16:29:47 10 opinions that I discussed earlier today that
16:29:51 11 gray marketing is a material issue that
16:29:55 12 needed disclosure would have involved, then,
16:30:01 13 some more substantial portion of my time
16:30:04 14 reviewing all the materials involved in the
16:30:07 15 case to come to that determination as we
16:30:09 16 discussed earlier today.

16:30:11 17 To then research the issue of
16:30:16 18 investigation conducted by the underwriters
16:30:21 19 took, again, some more substantial time in
16:30:25 20 terms of reviewing the underwriters'
16:30:26 21 deposition transcripts and exhibits,
16:30:29 22 reviewing -- well, prior to Mr. Necarsulmer's
16:30:34 23 report, reviewing that information to
16:30:37 24 determine whether the investigation appeared
16:30:39 25 to be adequate from that point of view, so

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16:30:43 1 that's the way I view answering your
16:30:46 2 question.
16:30:47 3 Having done that, I can't recall
16:30:48 4 allocating the hours I've spent in any
16:30:52 5 fashion to that as opposed to the other work
16:30:55 6 we've done. I think that's a general answer
16:30:57 7 to your question.
15:53:01 8 BY MR. GLUCKOW:
15:53:01 9 Q. In terms of the last part of what
16:31:00 10 you talked about, which was whether the underwriters'
16:31:04 11 investigation was reasonable and adequate, I think you
16:31:06 12 used adequate but either way, did you spend time
16:31:12 13 analyzing that question prior to submitting your
16:31:17 14 initial report?
16:31:18 15 A. Yeah, I spent some time on that
16:31:22 16 issue prior to submitting a report.
16:31:23 17 Q. What is your best estimate on how
16:31:28 18 much time you spent on that prior to submitting your
16:31:31 19 initial report?
16:31:31 20 MR. LEWIS: Objection, asked and
16:31:34 21 answered.
16:31:34 22 THE WITNESS: I'll take a one to ten
16:31:46 23 hour range again.
15:53:01 24 BY MR. GLUCKOW:
15:53:01 25 Q. As you've said, you essentially

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16:31:55 1 reserved your opinion on that issue pending receipt of
16:32:02 2 information from the defendants concerning the
16:32:05 3 underwriters' investigation, correct?
16:32:08 4 A. Sure.
16:32:09 5 Q. If you can, can you describe for me,
16:32:18 6 again just focused on 19 through 21, the drafting
16:32:22 7 process you used for putting these paragraphs
16:32:25 8 together?
16:32:29 9 A. I believe that the bulk of the
16:33:12 10 actual wording, I had previously prepared in
16:33:18 11 connection with other matters.
16:33:20 12 Q. Including the AMF Bowling matter?
16:33:23 13 A. Yeah. I think there may have been
16:33:25 14 two specific matters that I thought might have been
16:33:31 15 close in terms of language and took AMF Bowling and --
16:33:40 16 going blank on the second one. Started with that
16:33:47 17 information, then went through all of that to have it
16:33:54 18 reflect the facts and attributes of this case with
16:33:58 19 respect to Adams Golf specifically and the factors
16:34:01 20 that would have been relevant to this work with
16:34:04 21 respect to Adams Golf.
16:34:05 22 Q. I'm going to look at the list of
16:34:09 23 depositions and arbitrations that you mentioned
16:34:12 24 earlier to see if one of these is the matter you had
16:34:15 25 in mind besides AMF Bowling. Was it CFS or Alpha or

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